United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-1043

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 74–1043

RICHARD A. GORDON, *etc.*,
Plaintiff-Appellant,
against
NEW YORK STOCK EXCHANGE, INC., *et al.*,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

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Issues Presented For Review

1. The principal issue presented for review is whether the District Court correctly held that in view of Section 19(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78s(b), which authorizes registered securities exchanges to adopt and enforce rules fixing reasonable rates of commission and vests the power of review and revision of such rules in the Securities and Exchange Commission (the "SEC"), which power is being actively exercised, the Sherman Antitrust Act, 15 U.S.C. §§ 1 *et seq.*, is inapplicable to the rules of the defendant exchanges fixing minimum commissions to be charged by their members to public customers.

2. Also presented for review are the following questions:

(a) Did the District Court err in dismissing plaintiff's claim that the rules of the defendant exchanges providing for a volume discount from their minimum commission rates constituted price discrimination under the Robinson-Patman Act, 15 U.S.C. §§ 13 *et seq.*?

(b) Did the District Court err in dismissing plaintiff's claim, under Section 4 of the Clayton Act, 15 U.S.C. § 15, based on the provisions of the constitutions of the defendant exchanges limiting the number of their respective members?

Counter-Statement of the Case

A. Nature of the Case, Course of Proceedings and Disposition

This action was commenced on April 2, 1971, by Richard A. Gordon, individually and on behalf of an alleged class of "small investors", against the New York Stock Exchange, Inc. (the "NYSE"), the American Stock Exchange, Inc. (the "Amex") (collectively the "defendant exchanges") and Merrill Lynch, Pierce, Fenner & Smith, Inc. and Bache & Co., Inc., as representatives of an alleged class consisting of the defendant exchanges' members.

While plaintiff now asserts (Plaintiff's Brief ["P.Br."] 2) that his complaint challenged generally the practice of "fixing the rates of commission, charged investors for stock transactions", no such allegation was in fact made. Rather, plaintiff challenged the legality, under the Robinson-Patman Act, 15 U.S.C. §§ 13 *et seq.*, of the defendant exchanges' rules providing for a volume discount from their minimum commission schedules (in effect during the period December 5, 1968 to March 24, 1972) (see App. 5; 42-44, 49; 182-84, 192) and an interim service charge on "small

transactions'' (in effect during the period April 5, 1970 to March 24, 1972) (App. 4; 44-47, 49; 188-89, 192); and the adoption of rules permitting their members to set commission rates individually with respect to certain large-size transactions (after April 5, 1971) (App. 5-6; 47-50; 189-92). (Complaint, paras. THIRTEENTH through NINETEENTH; App. 4-6)

Plaintiff also attacked the provisions of the constitutions of the two exchanges fixing the number of their respective members and the alleged resulting exclusion of plaintiff from use of the defendant exchanges' trading facilities. (Complaint, para. SEVENTEENTH; App. 5)

The complaint sought injunctive relief (para. TWENTY-SECOND a-c; App. 9-10), treble damages of $1.5 billion, plus interest, and an attorney's fee of $10 million and costs and disbursements. (Complaint, para. TWENTY-SECOND d; App. 10)

In their answers, served September 28, 1972, defendants pleaded, *inter alia,* that the exchanges' rules fixing minimum commissions had been adopted and enforced under the express Congressional mandate of Section 19(b)(9) of the Exchange Act, which gave the SEC exclusive jurisdiction to review and revise such rules, which jurisdiction it was actively exercising, thus rendering the antitrust laws inapplicable. (App. 14, 20, 28) On December 4, 1972, defendants moved for summary judgment on this and other grounds. That motion was granted and an order dismissing the action was entered on December 4, 1973. (App. 355, see 357, 340)

In contesting defendants' motion plaintiff did not controvert defendants' statement of the material facts as to which there was no dispute, filed pursuant to General Rule 9(g) of the Southern District of New York (App. 33-37), nor did plaintiff dispute any of the facts set forth in the affidavits of Robert M. Bishop (App. 178-92) and H. Ver-

non Lee (App. 38-50) submitted in support of defendants' motion. Conceding that the issue was purely one of law, plaintiff argued that the facts demonstrated nothing more than the SEC's non-objection to various commission rate changes or the SEC's "suggestions" as to appropriate rule revisions and that such a record of regulation was neither tantamount to SEC "approval" of the rules challenged nor an indication that the rules were government-mandated. (See App. 325-28)

In rejecting plaintiff's arguments and granting summary judgment for defendants, the District Court turned first to plaintiff's claims of exclusion based upon the numerical limitation of members in the exchanges and price discrimination.

The Court held that plaintiff had no standing to complain of any limitations on members, because plaintiff had at no time ever applied for admission to exchange membership, and that in any event, such numerical limits on exchange members were not unlawful. (App. 342-43) Likewise, the Court dismissed plaintiff's claim of price discrimination, concluding that the Robinson-Patman Act is addressed solely to transactions in "commodities" and is inapplicable to brokerage services. (App. 344)

The District Court then went on to hold that because Section 19(b)(9) of the Exchange Act, 15 U.S.C. § 78s(b)(9), adopted in 1934, expressly authorized exchange rate fixing, subject to SEC oversight jurisdiction, that provision repealed by implication the earlier Sherman Act prohibition of concerted rate-fixing as applied to registered securities exchanges. The Court also held that implied exemption from the Sherman Act is necessary if the SEC is to continue to perform its statutory function with respect to rate-fixing and make the Exchange Act's scheme of regulation

work in the manner intended by Congress.* (App. 344-55) Plaintiff appealed. (App. 357)

On March 29, 1974, the Antitrust Division of the Department of Justice filed a brief as *amicus curiae,* in which it urges reversal of the judgment below on the ground that there are triable issues of fact as to antitrust immunity. The SEC, on the other hand, is expected to submit a brief *amicus curiae* on May 24, 1974, urging affirmance of the decision of the District Court.

B. Relevant Facts

In the Court below plaintiff conceded that there was no genuine issue as to any of the material facts in this case and took the position that the decision here turned exclusively upon the proper interpretation of the Exchange Act and the legal effect of the SEC's review powers and its regulatory conduct with respect to the various exchange rules challenged. (See App. 326-28) Now, however, apparently taking his cue from the Antitrust Division, plaintiff argues not only for judgment in his favor but, alternatively, for a remand and trial of alleged issues of fact. This he cannot do. It is hornbook law that a party cannot raise on appeal an issue conceded and therefore abandoned below. See, *e.g., Edward B. Marks Music Corp.* v. *Continental Record Co.,* 222 F.2d 488, 492 (2d Cir.), *cert. denied,* 350 U.S. 861 (1955); see also, *Hormel* v. *Helvering,* 312 U.S. 552, 556 (1941); *Terkildsen* v. *Waters,* 481 F.2d 201, 204-05 (2d Cir. 1973). Nor is the Antitrust Division, as *amicus curiae,* in any position to assert claims which are foreclosed to the party in whose support it argues, since an *amicus* must take the case as presented to the Court by the parties. See, *e.g., Knetsch* v. *United States,* 364 U.S. 361, 370 (1960).

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* Because it dismissed plaintiff's claims on the merits, the District Court did not consider plaintiff's motion for a class action determination. (App. 355)

More importantly, the alleged triable issues now listed by plaintiff (P. Br. 14) are completely irrelevant, since questions as to the reasonableness or effect of the challenged exchange rules and practices are not germane to a determination of the question of antitrust immunity. There is no dispute as to the nature and extent of the SEC's regulatory activity, which is a matter of public record. The decision turns on the proper interpretation to be given the Exchange Act and the consequences of the SEC's regulatory conduct.

The material facts, not disputed below, may be briefly stated as follows:

The NYSE and the Amex are not-for-profit corporations, each of which provides for its members and the public a two-way auction market in stocks and other securities. (A two-way auction market is one in which there is competition among sellers as well as among buyers.) (App. 38-39; 178-79)

The maximum number of "members" of the NYSE (all individuals) is presently fixed at 1,366. The NYSE also has 527 "member firms" and "member corporations" (firms and corporations in which at least one general partner or one director, owning voting stock, is an individual member of the NYSE) (hereinafter referred to as "member organizations"). (App. 179) The number of such member organizations is not expressly limited.

The Amex membership presently consists of 650 regular individual members, who have direct access to the trading floor, and 217 associate members, who may do business on the trading floor only through a regular member. In addition, there are over 500 regular and associate member organizations, *i.e.*, partnerships and corporations in which the general partners or the directors and major stockholders are Amex members or are approved by the Amex's Board of Governors. (App. 39)

Since their founding, the NYSE and the Amex have at all times had rules (a) limiting the number of individuals who may be members and (b) prescribing the minimum commissions to be charged by their members and member organizations on transactions executed for the investing public in securities listed on the respective exchanges. (App. 39; 179)

The NYSE and the Amex were registered by the SEC as national securities exchanges in 1934 pursuant to the provisions of Section 6 of the Exchange Act, 15 U.S.C. § 78f. (App. 39-40; 179-80) Together with their applications for registration, the two exchanges filed with the SEC copies of their constitutions and rules, which included the provisions then in effect limiting the number of members and prescribing minimum commission rates to be charged by their members and member organizations. (App. 39-40; 179-80, 193-200)

Under Section 6 of the Exchange Act the SEC could grant registration only if it found that the rules of the exchange were "just and adequate to insure fair dealing and to protect investors" (Sec. 6(d)) and provided sanctions against conduct inconsistent with "just and equitable principles of trade", including violations of the Act and rules thereunder (Sec. 6(b)).

By its order dated September 28, 1934, effective October 1, 1934, the SEC approved the NYSE's application and found that its constitution and rules (including its rules on commission rates and its limitation on the number of members) met the statutory requirements. (App. 179-180, 201-202) The Amex was similarly registered, and its constitution and rules approved, by the SEC on September 23, 1934. (App. 39-40)

The defendant exchanges' commission rules have at all times since 1934 been subject to the SEC's power of review

under Section 19(b) of the Exchange Act, which authorizes the SEC to request, and if necessary to require, changes in rules fixing commission rates to insure that they are "reasonable" and meet the other statutory standards. Section 19(b), 15 U.S.C. §78s(b), provides in relevant part as follows:

> "Sec. 19 * * * (b) The Commission is further authorized, if after making appropriate request in writing to a national securities exchange that such exchange effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such exchange has not made the changes so requested, and that such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange, by rules or regulations or by order to alter or supplement the rules of such exchange (insofar as necessary or appropriate to effect such changes) in respect of such matters as * * * (9) *the fixing of reasonable rates of commission,* interest, listing, *and other charges;* * * * and (13) similar matters." (Emphasis added)

Since their respective registrations in 1934, the NYSE and the Amex have amended the provisions of their constitutions and rules prescribing minimum rates of commission a number of times in conjunction with the SEC. The most recent amendments were those which became effective on or about December 5, 1968, April 5, 1970, April 5, 1971, March 24, 1972, April 24, 1972, September 25, 1973 and February 24, 1974. (App. 180) In each instance, the amendments were filed with the SEC at the time of their adoption as required under Section 6(a)(4) of the Exchange Act. (App. 40-41, 180)

On April 6, 1964 the SEC adopted Rule 17a-8, 17 CFR § 240.17a-8, which provides in pertinent part:

> "Each national securities exchange shall file with the Commission three copies of a report of any proposed amendment or repeal of, or any addition to, its rules not less than three weeks (or such shorter period as the Commission may authorize) before any action is taken on such amendment, repeal, or addition by the members of such exchange or by any governing body thereof . . ."

In announcing the adoption of this rule the SEC stated, "Rule 17a-8 should afford an opportunity for orderly Commission consideration of exchange rules before they become effective." Exchange Act Release No. 7253, CCH Fed. Sec. L. Rep. ¶ 76,973, at p. 81,617 (March 3, 1964). Since the adoption of Rule 17a-8, each of the defendant exchanges has submitted proposed changes in its constitution and rules governing commissions to the SEC in accordance with the Rule, in addition to its filings under Section 6(a)(4). (App. 40; 180)

The changes which plaintiff challenged were those adopted from December 5, 1968 to April 5, 1971 and which (1) introduced a volume discount; (2) imposed a temporary service charge on small transactions; and (3) permitted members to set their own rates on portions of orders over a certain size. (App. 4-5; 44-48; 180, 186-90) All of these changes were made either at the specific behest or with the express approval of the SEC.

In 1959, the SEC requested the NYSE to undertake a study as to the possible introduction of a volume discount from its theretofore uniform schedule of rates. (App. 182) Beginning in 1965, the Amex undertook studies of its intramember and non-member commission rate structures, with particular emphasis on institutional size transactions. (App. 41-42)

Both the NYSE and the SEC developed proposals to deal with the problems created by the absence of a volume discount. These proposals were made public and comment invited on January 26, 1968 in the SEC's Exchange Act Release No. 8239. (App. 216-25)

On May 28, 1968, the SEC announced that, on the basis of its intensive study of the questions involved, it had determined that "changes in the present commission rate structure are required to benefit the investing public" and ordered public hearings to be held. (App. 184) Expressly invoking Section 19(b) of the Exchange Act, the SEC directed that certain interim adjustments be made in the commission rate structure pending a final revision at the conclusion of the hearings. (App. 184-85)

On the same day, the SEC sent the Amex a copy of its May 28 letter to the NYSE, advising the Amex that "the Commission has not directed a similar letter to your Exchange because of possible differences in the situation prevailing", but requesting "that you give immediate attention to appropriate modifications of your commission rate structure, including any necessary interim steps." (See App. 42-43)

Subsequently, the SEC modified its request under Section 19(b) and thereafter approved changes in the rules of the defendant exchanges to provide a volume discount on all public orders involving more than 1,000 shares of stock. (App. 44; 186)

The subsequent adoption of the interim service charge was also the result of meticulous inquiry by the SEC, which approved its introduction for a limited time on condition that the exchanges ensure that small investors were not discriminated against and that member organizations take steps to ameliorate their financial problems. (App. 44-46, 91-129, 133-35; 186-87, 264-65) This interim service charge

became effective on both exchanges in April 1970 and remained in effect until March 1972. (App. 46-47; 187-89)

Shortly after the introduction of the interim service charge in 1970 the SEC determined on the basis of its intensive investigation of the commission rate structure over nearly a decade, including two SEC reports (The Special Study of 1963 and the Institutional Investor Study of 1971) and two years of testimony adduced at public hearings, that fixed charges for portions of orders above a certain amount were neither necessary nor appropriate under the Exchange Act. (App. 47-48, 189-90) In compliance with the SEC's determination, the NYSE and the Amex each adopted changes in their constitutions to permit their members to set commission rates independently on portions of orders in excess of $500,000. (App. 48, 190)

The SEC directed that a program of monitoring the impact of independently set rates above the $500,000 level be instituted by the defendant exchanges. (App. 48-49, 190-91) After obtaining the results of such monitoring, the SEC, on February 2, 1972, announced its determination to have the breakpoint lowered to $300,000. (App. 49, 191) In compliance with this determination, the NYSE and the Amex made the necessary changes in their respective constitutions and rules, effective in April 1972. (App. 49, 191-92)

These changes in the commission rate structure also repealed the previously adopted volume discount and interim service charge and replaced them with a cost-related schedule of commission rates incorporating a discount for volume transactions. (App. 49, 192)

Subsequent to the submission of defendants' motion for summary judgment in this case, further developments occurred in connection with the fixing of commissions by the NYSE and the Amex. Because these developments are of substantial importance and are matters of public record, they are described below.

On September 11, 1973, on the basis of its continuing investigation, the SEC announced that it would, in the exercise of its Section 19(b) authority, "act promptly to terminate the fixing of commission rates by stock exchanges after April 30, 1975, if the stock exchanges do not adopt rule changes achieving that result." Exchange Act Release No. 10383, CCH Fed. Sec. L. Rep. ¶ 79,511, at p. 83,406. In explanation, the SEC later stated that while the exchanges' system of fixed minimum commissions was authorized by the Exchange Act, the SEC had, since 1968, looked to the introduction of competitive rates and believed that its policy of prudent gradualism in accomplishing that result now appeared to justify the abandonment of fixed commissions after April 30, 1975. See Exchange Act Release No. 10560, CCH Fed. Sec. L. Rep. ¶ 79,603, at p. 83,622 (Dec. 14, 1973).

In response to the SEC's request in February 1974 that the exchanges develop a program fostering "limited price competition" (Exchange Act Release No. 10560, *supra,* at p. 83,622), the NYSE adopted changes in its constitution, effective April 1, 1974, to provide for the elimination of fixed commissions on orders of $2,000 or less. (New York Stock Exchange Member Firm Educational Circular No. 441, March 28, 1974) Similar changes were made in the constitution and rules of the Amex, also effective April 1, 1974. (American Stock Exchange Information Circular No. 29-74, March 29, 1974)

Meanwhile Congress has made significant progress on legislation designed to amend the Exchange Act so as to eliminate the practice of fixing of commissions by exchanges after a fixed date (see discussion at pp. 16-20, below).

Thus, the record shows that the District Court correctly ruled that the commission rules challenged by plaintiff were adopted pursuant to Congressional mandate and have been subjected to active regulatory supervision by the SEC.

ARGUMENT

I.

The District Court Properly Held That the Antitrust Laws are Inapplicable to Rules of Exchanges Fixing Commissions Subject to SEC Review Pursuant to the Exchange Act.

A. The Fixing of Reasonable Commission Rates By Exchanges is Within the Scope of Exchange Self-Regulation Subject to SEC Review Mandated by Congress

1. *The Exchange Act Grants Exchanges Power to Fix Rates*

The District Court properly concluded (App. 349) that the Exchange Act on its face includes the fixing of minimum rates of commission among the self-regulatory activities in which an exchange is authorized to engage, subject to oversight by the SEC. Section 19(b)(9) provides:

> "Sec. 19. * * * (b) The Commission is further authorized, if after making appropriate request in writing to a national securities exchange that such exchange effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such exchange has not made the changes so requested, and that such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange, by rules or regulations or by order to alter or supplement the rules of such exchange (insofar as necessary or appropriate to effect such changes) in respect of such matters as * * * (9) *the fixing of reasonable rates of commission,* interest, listing, *and other charges;* * * * and (13) similar matters." (Emphasis added)

It is clear that in granting the SEC the power to "alter or supplement" the rules of an exchange "in respect of such

matters as . . . the fixing of reasonable rates of commission", Congress obviously contemplated that the rules of an exchange would fix commissions. Otherwise, there would be nothing for the SEC to alter or supplement. This is emphasized by the fact that Congress directed the SEC, as a prerequisite to any revision in existing exchange rules, to first request an exchange to "effect on its own behalf specified changes in its rules and practices".*

Thus, the District Court properly concluded that the "facial language of the Exchange Act gives the Exchange and the Commission the power to 'fix' commission rates." (App. 349)

2. *The Legislative History Confirms the Rate Fixing Power*

When the Exchange Act was under consideration by Congress, in testimony before the Senate Committee on Banking and Currency and in the House Committee on Interstate and Foreign Commerce, the long established practice of the fixing of minimum commission rates by stock exchanges was repeatedly discussed by members of those Committees as well as by witnesses from the various exchanges. See *Hearings on S. Res. 84 Before Senate Committee on Banking and Currency,* 73d Cong., 2d Sess., Pt. 13, pp. 6075, 6080-81 (1934); *Hearings Before House Committee on Interstate and Foreign Commerce,* H.R. 7852 and H.R. 8720,

* Another provision of the Exchange Act—Section 3(a)(3)—similarly evidences a Congressional intention to allow the exchanges to continue their practice of fixing minimum commission rates for transactions with public customers. The last clause of that section, 15 U.S.C. 78c(a)(3), defines a member of a national securities exchange as a person who is permitted to effect transactions on an exchange "with the payment of a commission or fee which is less than that charged the general public . . . " This provision obviously contemplates the fixing by exchanges of a minimum rate of commission to be charged the general public, since without such a rate there would be no criterion by which to gauge the lesser fee contemplated by the statute for members' transactions. *Accord,* SEC *amicus curiae* brief (pp. 15-16) submitted in Kaplan v. Lehman Bros., 371 F.2d 409 (7th Cir.), *cert denied,* 389 U.S. 954 (1967). See footnote on p. 19, below.

73d Cong., 2d Sess., pp. 320-21, 423-24 (1934). The constitution of the NYSE containing provisions establishing minimum rates of commission was introduced as an exhibit in the hearings. *Hearings on S. Res. 84 Before Senate Committee on Banking and Currency,* 72d Cong., 1st Sess., App. to Pts. 1-3, Ex. 24, pp. 21-22 (1932). Likewise, in the House and Senate debates repeated reference was made to the fixing of commission rates. 78 Cong. Rec. 8087, 8091-92, 8490, 8493-94 (1934).

Section 18(c) of the original bills which were to become the Exchange Act (H.R. 7852 and S. 2693) would have encroached upon the traditional practice of exchange rate-fixing by providing that:

> "The Commission may fix or prescribe the method of fixing uniform rates of commission. . . ."

Ultimately, however, the Congress determined to continue the exchanges' power to fix commission rates but to subject the commissions so fixed to review and potential revision by the SEC, measured by a standard of reasonableness. Accordingly, Section 18(c) was redrafted and finally adopted in the form of Section 19(b) of the Exchange Act.

The District Court stressed this Congressional awareness of the exchanges' rate-fixing practices as supporting its holding that Congress intended to authorize the continuation of this practice:

> "We recognize that the legislative history of the 1934 Act is, perhaps typically, ambiguous as to Congress' intent regarding the Exchanges' long-standing practice of fixing commission rates. As Professor Baxter of Stanford Law School has noted:
>
> > "'[t]he attention of Congress in 1934 was focused on problems of dishonesty, manipulation, and solvency, and . . . no coherent congressional purpose was articulated concerning the problems of intra-industry competitive structure.' Baxter,

New York Stock Exchange Fixed Commission Rates: A Private Cartel Goes Public, 22 Stan. L. Rev. 675, 685 (1970).

"However, Congress clearly was aware of the Exchanges' rate-fixing practices, since both House and Senate debates on the Act specifically refer to the fixing of commissions. See, e.g., 78 Cong. Rec. 8087, 8092, 8490, 8493-94 (1934)." (App. 350)

The Antitrust Division, in its *amicus* brief, now argues (Antitrust Division's Brief ["A. D. Br."] 24) that Congress was so concerned with other aspects of securities regulation that it paid little or no attention to what is now urged as a *per se* violation of the antitrust laws. The Division contends (A. D. Br. 25) that it would be "unreasonable to suppose that the 1934 Congress wanted to protect brokers from possible lower profits". This contention overlooks the remarks of Representative Pettengill during the House debates on the Exchange Act. There, in arguing against permitting a governmental agency to fix rates directly, the Congressman said:

"[T]he Commission could fix rates of commission . . . so low that no broker could stay in business and thus [the Commission could] destroy his business. . . ." 78 Cong. Rec. 8091 (1934)

See also 78 Cong. Rec. 8087, 8490, 8493-94 (1934).

Moreover, as noted by the District Court, the Antitrust Division has previously elsewhere conceded that "it cannot be said that Congress intended to outlaw fixed minimum commissions in passing the 1934 Act." (App. 356)

3. *Recent Developments in Congress Confirm the District Court's Interpretation of the Exchange Act.*

The District Court properly took judicial notice of legislation pending before both Houses of Congress—S. 470 and H.R. 5050—in ascertaining the original Congressional in-

tent behind the Exchange Act. *Federal Housing Administration* v. *The Darlington, Inc.*, 358 U.S. 84 (1958); *Banco Nacional de Cuba* v. *Farr*, 383 F.2d 166, 175 (2d Cir. 1967), *cert, denied*, 390 U.S. 956 (1968). The Court found that this pending legislation supported its holding that Section 19(b)(9) authorized exchange rate-fixing:

> "Moreover, recent developments in Congress regarding the commission structure support the holding here. The Senate recently rejected amendments to the 1934 Act which would have mandated the elimination of fixed commissions within two years. See 119 Cong. Record, S11385-6, June 18, 1973. It is reasonable to infer from the proposal of these amendments that Congress did not believe fixed commissions were already illegal under the anti-trust laws, and, of course, the rejection of the amendments suggests that Congress does not now regard fixed rates as offensive to the Exchange Act or the anti-trust laws." (App. 353)

The Antitrust Division urges (A. D. Br. 17-18) that such pending legislation was irrelevant to the issues before the District Court because neither bill seeks to confer antitrust immunity on exchanges. This contention ignores the fact that both bills contemplate the future elimination of fixed commissions and, thus, clearly imply that the practice is presently lawful.

(a) *The Senate Bill*

The bill which became S. 470, when favorably reported out by the Subcommittee on Securities of the Senate Committee on Banking, Housing and Urban Affairs on April 17, 1973, provided, *inter alia*, that "after April 30, 1974, no exchange shall maintain or enforce any rule fixing minimum rates of commission with respect to any transaction" provided, however, that the SEC may permit an exchange to continue fixing such minimum rates until April 30, 1975, for transactions (or portions thereof) involving $100,000 or less if the SEC finds this to be in the public interest. (Sec. 1) The Senate Bill also sought to amend

Section 19(b)(9) of the Exchange Act so as to strike the word "commission", leaving the exchanges free, however, to fix "reasonable rates of interest, listing and other charges". (Sec 4)*

Obviously, if Congress thought that exchange rate-fixing was illegal, it would not seek to enact legislation to prohibit such conduct. Likewise, it would not contemporaneously specifically seek to amend Section 19(b)(9) of the Exchange Act to strike the word "commission" if it did not believe that this provision of the Act authorizes the rate-fixing sought to be ended.

Prior to the Subcommittee's action it had suggested that no legislation eliminating exchange rate-fixing was necessary because satisfactory progress in that matter was being made by the exchanges and the SEC. See *Securities Industry Study, Report of the Subcommittee on Securities, Senate Committee on Banking, Housing and Urban Affairs,* 93rd Cong., 1st Sess., 43-44 (February 1973). Accordingly, when the full Committee considered the Subcommittee draft, it deleted that provision of the bill prohibiting fixed commissions after a certain date and inserted in its place a provision that so long as rates continue to be fixed, institutional investors, *e.g.,* mutual funds, should be permitted to acquire exchange membership and thereby obtain the benefits of lower intra-member commission rates for the benefit of their shareholders.** Again, this manifests a belief that exchange rate-fixing is now statutorily authorized. If Congress believed the fixing of minimum rates of commission by exchanges, subject to SEC oversight, were offensive to the antitrust laws, it would not seriously be considering legislation expressly permitting others to join in a breach of the law.

On June 18, 1973, the United States Senate passed S.470 by a vote of 85 to 3. 119 Cong. Rec., S11385-6, June 18, 1973.

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* See Committee Print No. 21, April 17, 1973, reproduced in the Appendix to this brief.

** A copy of S. 470 is reproduced in the Appendix to this brief.

(b) *The House Bill*

H.R. 5050,* presently undergoing "mark-up" and amendment in the Subcommittee on Commerce and Finance of the Committee on Interstate and Foreign Commerce of the House of Representatives, when introduced on March 1, 1973, by Congressman Moss (as well as by all of the members of his Subcommittee) provided that exchanges could continue to fix minimum rates of commission on transactions (or portions thereof) involving $200,000 or less until February 1, 1974, and on transactions (or portions thereof) involving $100,000 or less until February 1, 1975, and prohibited the fixing of minimum rates of commission thereafter, unless the SEC found it in the public interest to continue for one additional year a system of fixed minimum rates for transactions (or portions thereof) involving $100,000 or less, after which the SEC would no longer have any power to permit continuation of a fixed minimum commission system. (H.R. 5050, Sec. 202) The Moss Bill also eliminated Section 19(b) of the Exchange Act in its present form. (H.R. 5050, Sec. 208)

Finally, the Moss Bill amended Section 3(a)(3) of the Exchange Act so as to redefine the term "member" (H.R. 5050, Sec. 201).**

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* A copy of H.R. 5050 is reproduced, in relevant part, in the Appendix to this brief.

** In introducing his Bill, Congressman Moss explained the reason for the amendment of Section 3(a)(3) as follows:

> "Current law includes within this definition a person who can make use of the facilities of an exchange to execute a transaction at the so-called 'intra-member rate' (a rate less than the fixed minimum commission rate charged the general public). Since the bill abolishes all fixed minimum commissions, this part of the definition of 'member' is stricken and a new definitional section is added to include within the term 'member' any person who agrees to be regulated by an exchange and with respect to whom the exchange undertakes to enforce the federal securities laws and the exchange rules.
>
> "This amendment shall take effect February 1, 1975, coincident with the mandatory phase-out of fixed rates." (119 Cong. Rec., H1316, March 1, 1973)

See footnote on p. 14, above.

This Congressional activity, as the District Court noted (App. 353), demonstrates that Congress does not believe that the fixing of commissions is now a practice which violates either the Exchange Act or the antitrust laws. To conclude otherwise would be to ascribe to Congress a desire to expend an extraordinary amount of time and effort on redundancy.

4. *The SEC Has Consistently Interpreted Section 19(b) to Permit Minimum Rate-Fixing by Exchanges*

Since the adoption of the Exchange Act, the SEC has consistently interpreted Section 19(b)(9) as vesting in exchanges rate-making authority subject to the SEC's power to order changes or modifications.

In its 1963 *Report of the Special Study of Securities Markets of the Securities and Exchange Commission* ("Spec. Study"), House Doc. No. 95, 88th Cong., 1st Sess., the SEC stated:

> "The subject of stock exchange commission rates is of importance entirely apart from the dollar amounts involved, since the structure of commission rates—the relative amounts charged for transactions of various types by persons in various categories—has far-reaching impacts on market patterns and practices. Both the level and structure of commission rates are established by rules of the various exchanges and are encompassed in the Commission's statutory authority with respect to 'the fixing of reasonable rates of commission' (sec. 19(b)(9) of the Exchange Act)." (Spec. Study Pt. 2, p. 294)
>
> * * * *
>
> ". . . the statutory scheme . . . vests ratemaking initiative in the exchanges and a residual, albeit continuing, responsibility of oversight in the Commission." (Spec. Study Pt. 2, p. 329)
>
> * * * *

". . . The first step is that an exchange adopts rules fixing rates of commission. If changes are deemed necessary or appropriate, the Commission is to present an 'appropriate request' in writing for specified changes. Compliance by the exchange presumably ends the matter, but if the exchange does not accede, the Commission is empowered, after appropriate notice and opportunity for hearing, 'by rules of [*sic*] regulations or by order to alter or supplement the rules of such exchange (insofar as necessary or appropriate to effect such changes) in respect of * * * (9) the fixing of "reasonable" rates of commission * * *.' " (Spec. Study Pt. 2, p. 344)

Four years later, in its *amicus* brief filed with the Court of Appeals for the Seventh Circuit in *Kaplan* v. *Lehman Bros.*, 371 F.2d 409 (7th Cir.), *cert. denied*, 389 U.S. 954 (1967), the SEC observed as follows:

"Since Section 19(b)(9) expressly vests the Commission with power to alter or supplement the rules of an exchange in respect of 'the fixing of reasonable rates of commission,' it follows that Congress contemplated that exchanges would have and enforce such rules. Otherwise there would be nothing upon which Section 19(b)(9) could operate". (Brief *amicus curiae*, p. 15)

Elsewhere in its *Kaplan* brief, the SEC rejected the contention—advanced here by the Antitrust Division (A.D. Br. 24-26)—that as used in Section 19(b)(9), the word "reasonable" means *maximum* rather than *minimum* commissions, saying:

"Appellants apparently recognize that their basic argument that exchanges cannot have, and the Commission cannot permit, any rules fixing commission rates would render Section 19(b)(9) of the Exchange Act completely meaningless. They are thus driven to the argument (Br. 40) that Section 19(b)(9) refers

> only to 'maximum rates'. Taken in context, this suggestion is so unreasonable as to approach the absurd. It assumes that Congress intended when adopting Section 19(b)(9) to revolutionize completely the operation of all exchanges by outlawing the minimum rate structure with its attendant preference to members, which were the 'avowed objectives of organizing the NYSE in 1792' and involves 'the lifeblood of the brokerage business today', and to substitute a regime of maximum commission rates which has never existed on any American stock exchange, and this despite the fact that not a word in either the statute or its legislative history suggests any such extraordinary conclusion. It must be noted, moreover, that this wholly unsupportable suggestion is put forward by appellants not as a consequence of the application of the antitrust laws but as an interpretation of Section 19(b)(9) of the Exchange Act. As such, it can hardly be advanced seriously." (Brief *amicus curiae,* pp. 18-19; footnotes omitted)

More recently, in a release issued on December 14, 1973, the SEC described the rate-fixing process contemplated by the Exchange Act as follows:

> "[T]o the extent any such rules are appropriate, the promulgation of rules concerning exchange-required fixed commission rates is a matter that Congress entrusted to the exchanges in the first instance, *at least as long as the fixing of commission rates should be permitted."* Exchange Act Release No. 10560, *supra,* CCH Fed. Sec. L. Rep. ¶ 79,603, at p. 83,620 (Emphasis added).

Thus it is clear from the face of the Act, from its legislative history and from the interpretation of the Act by the SEC for nearly forty years, that Congress, far from intending to outlaw exchange minimum rate-fixing, deliberately included this long-standing practice within the scope of

exchanges' duty of self-regulation subject to review and revision by the SEC.

B. The District Court's Decision is Squarely in Accord with the Controlling Authorities Exempting Exchange Rate Fixing from the Antitrust Laws

In holding that Section 19(b) of the Exchange Act impliedly repeals the provisions of the Sherman Act as applied to exchange fixing of minimum commissions subject to SEC review, the District Court followed the square holding of the Court of Appeals for the Seventh Circuit in *Kaplan* v. *Lehman Bros.*, 371 F.2d 409 (7th Cir.), *cert. denied*, 389 U.S. 954 (1967).

In the *Kaplan* case the Court rejected an antitrust attack on the same practice of commission rate-fixing challenged here. In so doing it (and the District Court here) correctly applied the principles laid down as to exchange antitrust immunity by the Supreme Court in *Silver* v. *New York Stock Exchange, Inc.*, 373 U.S. 341 (1963).

1. *The Silver and Kaplan Cases*

In the *Silver* case, a broker who was not a member of the NYSE had secured private wire connections with certain NYSE member firms. The rules of the NYSE required its approval of such wire connections between members and non-members and discontinuance thereof by members upon instructions by the NYSE. Silver's wire connections had been approved on a temporary basis, but thereafter the NYSE, without notice or hearing, and for reasons which it did not divulge, ordered the connections discontinued. Silver sued for treble damages and injunctive relief, alleging that the discontinuance of his private wire connections by the NYSE constituted a group boycott prohibited by the Sherman Act.

The District Judge granted summary judgment, holding that the antitrust laws applied to the NYSE and that its directive and the ensuing compliance by its members con-

stituted a collective refusal to continue the wire connections and was, therefore, a *per se* violation of Section 1 of the Sherman Act. (196 F.Supp. 209)

On appeal, this Court reversed, holding that the Exchange Act exempted the NYSE from the restrictions of the Sherman Act because it was exercising disciplinary powers over its members and the statute required that these powers be exercised fully. (302 F.2d 714)

On certiorari, the Supreme Court held that, while the District Judge had erred in holding that the NYSE's conduct was outside the scope of the Exchange Act and constituted a *per se* violation of the antitrust laws, the case could not be disposed of as this Court had done on the ground that merely because the NYSE had a general power to adopt rules governing its members' relations with non-members, particular applications of such rules were exempt from the antitrust laws. (373 U.S. at 356-57)

The Supreme Court noted that, although the duties of self-regulation imposed on the NYSE by the Exchange Act afforded it an implied exemption from the antitrust laws in certain areas, such exemption could not be invoked where the particular action of the NYSE—the withdrawal of private wire connections without use of fair procedures—was not subject to SEC review. The Court ruled that since the Exchange Act contains no express exemption from the antitrust laws "any repealer of the antitrust laws must be discerned as a matter of implication" (373 U.S. at 357). While the Exchange Act imposed upon the NYSE a duty of self-regulation involving the initiative and responsibility to promulgate rules, the Court found that the power of the SEC under Section 19(b) did not extend so far as to give the SEC "jurisdiction to review particular instances of enforcement of exchange rules" (373 U.S. at 357). As Mr. Justice Goldberg, writing for the Court, put it:

> "The absence of [SEC] jurisdiction, besides defining the limits of the inquiry, contributes to its solution. There is nothing built into the regulatory scheme

> which performs the antitrust function of insuring that an exchange will not in some cases apply its rules so as to do injury to competition which cannot be justified as furthering legitimate self-regulative ends. By providing no agency check on exchange behavior in particular cases, Congress left the regulatory scheme subject to 'the influences of . . . [improper collective action] over which the [SEC] has no authority but which if proven to exist can only hinder the [SEC] in the tasks with which it is confronted.' *Georgia* v. *Pennsylvania R. Co.*, 324 U.S., at 460." (373 U.S. at 358-59)

It was this lack of SEC jurisdiction in *Silver* that led the Supreme Court to conclude that review of self-regulatory conduct by an antitrust court would not interfere with the regulatory scheme. Had there been SEC jurisdiction, intervention by an antitrust court would have presented the very difficulties presented here and described by the Supreme Court as a "conflict or coextensiveness of coverage with the agency's regulatory power." (373 U.S. at 358)

Having determined that the SEC lacked jurisdiction and that review by an antitrust court was therefore appropriate, the Court held that the conduct attacked—severing private wire connections without according procedural due process—was unjustified. The Court specifically left for future decision the question whether NYSE rules which had been submitted to and reviewed by the SEC, as contemplated by Section 19(b), were subject to the antitrust laws:

> "Were there Commission jurisdiction . . . a different case would arise concerning exemption from the operation of laws designed to prevent anticompetitive activity, an issue we do not decide today." (373 U.S. at 358, n. 12)
>
> * * *
>
> "Should review of exchange self-regulation be provided through a vehicle other than the antitrust laws, a different case as to antitrust exemption would be presented." (373 U.S. at 360)

The "different" case alluded to in *Silver* was first presented in *Kaplan* v. *Lehman Bros.*, 250 F. Supp. 562 (N.D. Ill. 1966), *aff'd*, 371 F.2d 409 (7th Cir.), *cert. denied*, 389 U.S. 954 (1967).

In *Kaplan*, shareholders in several mutual funds brought a derivative and class action against the NYSE and four of its member organizations alleging that the NYSE's rules fixing minimum commissions constituted a price fixing conspiracy in violation of the antitrust laws. The District Court, finding that the commission rules were subject to review and revision by the SEC pursuant to Section 19(b)(9) of the Exchange Act, and referring to the issue expressly reserved in *Silver*, concluded:

> "This is the 'different case', since the SEC exercises a general and continuing power to change, alter, or supplement the rules of the Exchange fixing the rates of commission. Since review is afforded within the system of securities regulation, there is no need to resort to the antitrust laws for a remedy." 250 F.Supp. at 566.

The Court therefore held that the fixing of rates of commission was immune from the prohibitions of the Sherman Act and granted summary judgment in favor of the defendants.

The SEC agreed with this result and, on appeal from the District Court's decision in *Kaplan*, submitted an *amicus curiae* brief to the Court of Appeals for the Seventh Circuit in which it stated:

> "We believe that there are situations, and the case at bar is clearly one, in which a court should hold that there is no violation of the antitrust laws and no liability in damages for the good faith adoption of a rule not clearly beyond the limits of permissible self-regulation, if it is adopted and enforced in a non-

discriminatory and fair manner, is filed with the Commission, and is subject to the Commission's Section 19(b) powers, notwithstanding that it is determined subsequently that such rule should be changed in order to further the policies of the Exchange Act, or to perfect a proper balance between the policies of the antitrust laws and the Exchange Act." (pp. 35-36)

The Court of Appeals for the Seventh Circuit unanimously affirmed the District Court's grant of summary judgment (371 F.2d 409), and the Supreme Court denied *certiorari* (389 U.S. 954). In holding exchange commission-fixing immune from antitrust attack, the Court of Appeals said:

"On the facts set forth in the complaint herein, we do not construe the Sherman act and the exchange act as showing a congressional intention to permit the maintenance of an antitrust prosecution of the exchange or its members to be based upon its action relating to rates of commission to be charged by its members. Obviously the fixing of minimum commissions is one method of regulating commission rates." (371 F.2d at 411)

Here, the District Court likewise found this to be the "different case" referred to in *Silver*, saying:

"We hold that this court lacks jurisdiction to entertain an anti-trust attack on the commission structure of the Exchanges, since the fixing of commissions falls squarely within the congressional policy of exchange self-regulation embodied in the 1934 Act. Since the Act expressly directs the SEC to supervise the 'fixing of reasonable rates of commission' (§ 19(b)(9)), we believe this is the 'different case,' on which *Silver* reserved decision, where review of exchange self-regulation is available 'through a vehicle other than the antitrust laws.'" (App. 346)

2. *The Thill Case*

Plaintiff and the Antitrust Division base their argument principally on *Thill Securities Corp.* v. *New York Stock Exchange, Inc.*, 433 F.2d 264 (7th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971).*

In that case, Thill claimed that the NYSE had violated the antitrust laws by prohibiting its members from sharing commissions with non-member brokers (such as Thill) and had discriminatorily applied the rule against some non-member brokers in favor of others.

The Court, distinguishing *Kaplan*, emphasized that whereas the power to fix rates charged the general public—the practice challenged in this case—posed no anti-competitive threat other than that "inherent in any system of authorized price-fixing", 433 F.2d at 270, the rule against sharing commissions was an anti-competitive weapon that could be used by exchange members to injure non-member brokers. Consequently, the Court stated that in such circumstances the "mere possibility of SEC review" did not necessarily wrap "the conduct of the Exchange in an impregnable shield of antitrust immunity" where there was no evidence "as to the extent to which the challenged rule is subject to *actual review* by the SEC." 433 F.2d at 269-70. (Emphasis added)

The Court of Appeals for the Seventh Circuit therefore reversed the District Court's grant of summary judgment for the NYSE and remanded for the purpose of developing a record as to SEC regulatory activity and for a determination whether "judicial interference with the Exchange's antirebate rules will frustrate the goals proposed by the Securities Exchange Act." 433 F.2d at 273. In short, the

* They also rely upon Harwell v. Growth Programs, Inc., 451 F.2d 240 (5th Cir.), *opinion on rehearing*, 459 F.2d 461, *cert. denied*, 409 U.S. 876 (1972). That case, however, not only dealt with a different statute from the one here under consideration, but, more significantly, was concerned with practices not expressly authorized by statute and the effect of those practices on an alleged breach of contract.

Thill court was concerned, as was the Supreme Court in *Silver,* that the maintenance of antitrust actions not impair SEC jurisdiction and thwart the operation of the Exchange Act, and the Seventh Circuit did not depart from its earlier holding in *Kaplan.*

Plaintiff's and the Antitrust Division's reading of *Thill* (P. Br. 7; A. D. Br. 12-13, 19 n. 11) is incorrect. *Thill* did not overrule *Kaplan* and the Seventh Circuit did not find, as they suggest, that the SEC's Section 19(b) jurisdiction was extraneous to the exemption issue.

In *Thill,* the Court of Appeals, observed:

> "Congress and our Supreme Court have directed the courts to employ this [antitrust] expertise unless the court in a given case concludes that its employment will frustrate the goals of the regulatory scheme. As we have indicated herein, no such conclusion is justified in this case, at least not in this stage of the proceedings —before any evidence has been offered to support the proposition that judicial interference with the Exchange's antirebate rules will frustrate the goals proposed by the Securities Exchange Act." (433 F.2d at 273)

The Antitrust Division accuses the Court below of ignoring *Thill* (A. D. Br. 13). On the contrary, the District Court took careful note of *Thill* and distinguished it, saying:

> "We believe that *Thill* is distinguishable from our case. First, the Act contains no specific directive to the SEC to supervise member-non-member relations; second, there was before the court no record of active SEC supervision in the area; third, the court thought the power to refuse to share commissions with non-members was a 'weapon that can be used to injure a particular competitor' (p. 270) and the plaintiff had alleged that the anti-rebate rule had in fact been unevenly applied." (App. 354)

3. *The Crosby Case*

As the Antitrust Division footnotes (A.D. Br. 15, n.9), the District Court for the District of Columbia, applying the principles of *Silver* in a context similar to the present case, recently rejected the Division's arguments asserted here in respect of antitrust immunity. *Haddad* v. *The Crosby Corp.*, 1973-2 Trade Cas. ¶ 74,841 (D.D.C. Dec. 14, 1973). There, the Division and a number of private plaintiffs challenged certain practices relating to the distribution of mutual fund shares, alleging that the various defendants had combined and conspired to fix the public offering prices, to restrict transferability, and to inhibit the growth of a secondary market, all in violation of the antitrust laws.

The Court found that the provisions of the Investment Company Act of 1940, 15 U.S.C. §§ 80(a)1-1 *et seq.*, and the Maloney Act Amendments to the Exchange Act, 15 U.S.C. § 78o-3(n), created a pervasive regulatory system providing for retail price maintenance and contractual restrictions on transferability and negotiability of mutual fund shares, subject to the supervisory oversight of the SEC and the NASD, a self-regulatory association. Relying on *Silver*, the Court concluded (at 95,749-52) that the conduct in question was immune from antitrust attack.

II.

Collateral Antitrust Attack On Exchange Rate Fixing Would Constitute An Impermissible Judicial Intrusion Into the SEC's Exclusive Jurisdiction and Frustrate the Goals of the Exchange Act.

Both plaintiff and the Antitrust Division overlook the Seventh Circuit's recognition in the *Thill* case that an exemption from the antitrust laws exists for exchange self-regulation where "judicial interference . . . will frustrate the goals proposed by the Securities Exchange Act". *Thill Securities Corp.* v. *New York Stock Exchange, supra*, 433 F.2d 264, 273 (7th Cir. 1970). Here the District Court ap-

plied this restatement of the *Silver* principle (see App. 354) and found in the record ample evidence "as to the extent to which the challenged rule is subject to active review by the SEC". (433 F.2d at 270) Accordingly, the Court below found that no antitrust action could be maintained (App. 346), because freedom from such collateral challenge of exchange rules, subject to active SEC oversight, was necessary to make the Exchange Act work in the manner contemplated by Congress.

Acceptance of the positions taken on this appeal by plaintiff and the Antitrust Division would require not only an ouster of the SEC from its traditional Congressionally-committed jurisdiction but would also necessarily result in the reevaluation by an antitrust court of the public policy determinations made by the SEC after 10 years of study and three years of public hearings—a result clearly incompatible with the Exchange Act's scheme of regulation.

Plaintiff asserts (P. Br. 7-11) that the record of regulation here in evidence does not constitute the active exercise of the SEC's regulatory jurisdiction or approval by the SEC of the rates fixed by the defendant exchanges. The District Court, however, properly found to the contrary, saying (App. 352-53):

> "We note that, beginning with the 1963 *Special Study of The Securities Markets,* the SEC and the Exchanges have undertaken intensive examination of Exchange commission structures and related matters. In 1968, the SEC initiated public hearings on the commission rate structure.
>
> Certain rate adjustments, such as the volume discount, and the interim charge, and experiments with negotiated commissions have resulted from these activities. Most significant, the SEC recently announced, in its Release 10383 (September 11, 1973), its intention to terminate the Exchange practice of fixing minimum commissions on all securities transactions after April

> 30, 1975, unless the Exchange in the meantime alters its rules to the same effect. It is fair to infer that the SEC is continuing to exercise its jurisdiction actively over rate-setting, pursuant to § 19(b)(9) of the Act."

Allowing a collateral antitrust attack in the circumstances of this case would result in the conflict between the courts and an administrative agency which the Supreme Court in *Silver* said should be avoided, and poses a very real danger of thwarting the regulatory scheme created by the Exchange Act. See *Robert W. Stark, Jr., Inc.* v. *New York Stock Exchange, Inc.*, 346 F.Supp. 217, 227-28 (S.D.N.Y.), *aff'd per curiam*, 466 F.2d 743 (2d Cir. 1972).

III.

Foreclosure of Collateral Antitrust Attack Does Not Foreclose Judicial Review of SEC action.

Plaintiff and the Antitrust Division, doubtless aware that their interpretation of the Exchange Act is in contradiction with controlling precedent and can be accepted only at the expense of the SEC's jurisdiction, attempt to bolster their arguments by raising the spectre that, without collateral antitrust review, SEC action can never be subjected to independent and adequate judicial scrutiny. (P. Br. 7-11; A.D. Br. 21) They rely on two unreported decisions in which no opinions were rendered. *Independent Investor Protective League* ["*IIPL*"] v. *SEC*, Dkt. No. 1984-71 (D.D.C., *filed*, Oct. 1, 1971, *dism'd without opinion*, June 19, 1972) and *IIPL* v. *SEC*, Dkt. No. 71-1924 (2d Cir., *dism'd without opinion*, Nov. 15, 1971).

Plaintiff's and the Division's reliance is misplaced. The grounds for dismissal of these actions were not disclosed, and it cannot therefore be said that they stand for any proposition of law. Nonetheless, to the extent one can surmise what the reasons for dismissal were, these cases would not appear to support either plaintiff or the Division.

IIPL's petition in the District Court for the District of Columbia was filed during the pendency of the SEC's hearings on the commission rate structure of national securities exchanges (see App. 47; 188). Accordingly, the petition was probably dismissed as premature. The petition in this Court was also filed during the pendency of those rate hearings and, more important, was clearly improper because unauthorized by the statutory section under which relief was sought.

In the latter petition, IIPL sought review of SEC action in this Court under Section 25 of the Exchange Act, 15 U.S.C. § 78y, providing direct review in the Courts of Appeals of SEC "orders." But the action sought to be reviewed was not an order, though it constituted agency action. Accordingly, IIPL's petition was properly dismissed. As the Court of Appeals for the District of Columbia explained in *Independent Broker-Dealers' Trade Association* v. *SEC*, 442 F.2d 132, 143 (D.C. Cir.), *cert. denied*, 404 U.S. 828 (1971):

> "Section 25(a) applies in terms only to 'orders,' a narrower concept than that of 'agency action' reviewable in district courts, and is available only to persons who were 'parties' to actual agency 'proceedings.' It was intended to provide direct review in cases wherein a clear, formal record of an administrative hearing would be before the reviewing court without the need for presentation to a court of evidence (or affidavit) of the agency's action".

See also, *PBW Stock Exchange Inc.* v. *SEC*, 485 F.2d 718 (3d Cir. 1973), *pet. for cert. filed*, 42 U.S.L.W. 3434 (U.S. Jan. 21, 1974).

Review of agency "action", as distinguished from an order, is properly had in a district court under the Administrative Procedure Act, 5 U.S.C. §§ 500 *et seq.* ("APA"). Section 6(a) of the APA authorizes any "interested person" to appear before an agency to present his views. 5

U.S.C. § 555(b). In addition, Section 4(d) permits such persons to petition an administrative agency for the issuance, amendment or repeal of any "rule", defined by Section 2(c) to include the "approval or prescription for the future of rates". 5 U.S.C. §§ 553(e), 551(4). Section 10 of the Act provides for district court review of any administrative action, broadly defined by Section 2(g) to include any form of action or failure to act. 5 U.S.C. §§ 702, 551(13).

Plaintiff's proper remedy for any claimed grievance concerning exchange commission rules was to petition the SEC, charged by Congress with the responsibility of administering those rules. As the Court said in *Independent Investor Protective League* v. *New York Stock Exchange,* 367 *F.Supp.* 1376, 1377 (S.D.N.Y. 1973), taking note of the APA:

> "If plaintiff wishes to influence or change exchange policy [or rules] his remedy is to petition the SEC to exercise its powers under Section 19(b) of the [Exchange] Act to recommend changes in Exchange rules or to alter or amend the rules."

Thereafter, if plaintiff found this remedy unavailing, his proper course was to proceed in the district court, under the APA, after the SEC's action had become ripe for review. See *Independent Broker-Dealer's Trade Association* v. *SEC, supra.*

Plaintiff raises the concern that the SEC could thwart an attempt to review its directives, instructions and "suggestions" to exchanges by asserting that no reviewable action within the meaning of the APA had been undertaken. But just such an assertion was rejected in *Independent Broker-Dealer's,* a proceeding brought in 1968 on behalf of an unincorporated association of securities broker-dealers seeking to enjoin the prohibition by exchanges of customer directed give-ups, resulting from a directive of the SEC. The plaintiffs in that proceeding contended that the SEC's directive to the exchanges to prohibit give-ups was agency action subject to judicial review and sought to have that action set aside. The SEC took the position at

that time (a position it has since repudiated) that its request to the NYSE, pursuant to Section 19(b), asking that the NYSE adopt such a prohibition, was not "agency action" subject to review under the Administrative Procedure Act. On this basis, the District Court for the District of Columbia dismissed the petition. However, the D.C. Circuit reversed, on the ground that direct judicial review was appropriate. A similar suggestion is also found in the recent decision of the Third Circuit in *PBW Stock Exchange Inc.* v. *SEC*, 485 F.2d 718, 726 and 733, (3d Cir. 1973), *pet. for cert. filed*, 42 U.S.L.W. 3434 (U.S. Jan. 21, 1974).

In short, there is nothing to the argument that meaningful review of exchange rules and SEC action with respect to such rules cannot be had without resort to an antitrust court.

IV.

The District Court Properly Dismissed Plaintiff's Claims of Price Discrimination and Exclusion from Membership as Lacking Any Merit.

A. The Robinson-Patman Act is Inapplicable to Brokerage Services

While the antitrust exemption found by the District Court to exist in favor of rate-fixing warranted dismissal of plaintiff's claims made under Section 2(a) of the Clayton Act (the Robinson-Patman Act), 15 U.S.C. § 13a, the Court below also dismissed those claims on independent grounds.

The District Court correctly held that the Robinson-Patman Act requires, as a jurisdictional matter, that a claim of price discrimination be made in connection with transactions in "commodities of like grade and quality." (App. 344) As the Court pointed out, the Robinson-Patman Act does not apply to the sale of services and intangibles and, specifically, neither the execution of transactions in securities nor securities themselves are "commodities" within the meaning of that Act. *Columbia Broadcasting System, Inc.* v. *Amana Refrigeration, Inc.*, 295 F.2d 375 (7th Cir.

1961), *cert. denied,* 369 U.S. 812 (1962); *Baum* v. *Investors Diversified Services, Inc.,* 409 F.2d 872, 875 (7th Cir. 1969).

Plaintiff continues to press those claims, despite the fact that he concedes (P. Br. 12), as does the Antitrust Division (A.D. Br. 6), that the District Court's decision is consistent with all relevant authority and that no case supports plaintiff's attempt to base a claim of price discrimination on transactions involving the sale of brokerage services.

Plaintiff seeks to avoid this obstacle to a claim under Section 2(a) of the Clayton Act by calling this Court's attention to Section 2(c) of the Clayton Act, 15 U.S.C. § 13(c) (P. Br. 12-13). But this is nothing more than a legal *non sequitur.* Not only does the payment of a commission for execution of securities transactions not violate the statutory section cited, but, as already noted, it is a jurisdictional requisite of the Robinson-Patman Act that the challenged transaction be in connection with "commodities".

Perhaps in recognition that his Robinson-Patman theory is without any statutory foundation, plaintiff now asserts, for the first time on appeal (P. Br. 12), that "a discriminatory price differential which favors large customers over small customers is, of course, a violation of Sections 1 and 2 of the Sherman Act." Plaintiff disregards the well recognized legal doctrine that there may be no appellate consideration of issues which might have been but were not raised below. See, *e.g., Hormel* v. *Helvering,* 312 U.S. 552, 556 (1941); *Terkildsen* v. *Waters,* 481 F.2d 201 (2d Cir. 1973). Adherence to this rule of practice is particularly apt here where plaintiff's failure to raise the claim in timely fashion prevented the District Court from considering his argument.

In any event, the record defeats plaintiff's eleventh hour attempt to convert his Robinson-Patman price discrimination claims into alleged Sherman Act violations. It is undisputed that the commission rules here attacked provide for

uniform fixed rates to be charged on all transactions of comparable size. The facts in the record show no discrimination.

Moreover, a claim of discrimination cannot offend the Sherman Act unless it results in competitive injury. Plaintiff is self-described as a "small investor" purchasing securities for his own account. Neither plaintiff nor any member of his purported class is in competition in any recognized line of commerce. Thus, the price differentials attacked in this case are not comprehended by the antitrust laws.

In sum, plaintiff's price discrimination claims were properly dismissed.

B. Plaintiff Lacks Standing To Challenge the Numerical Limitations on Exchange Members Which Are In Any Event Lawful

In addition to plaintiff's other claims, he challenged the exchanges' practice of limiting the number of their respective memberships. (App. 5, 10; see P. Br. 2 and 13)

The District Court properly found that plaintiff lacked standing to challenge, under Section 4 of the Clayton Act, 15 U.S.C. § 15, the numerical limitations imposed upon exchange memberships because it was undisputed that plaintiff had never made application for membership in either defendant exchange. (App. 342-343) In so holding, the District Court relied upon well established principles that, as a threshold matter, a plaintiff must show an injury arising directly and proximately from the antitrust violation claimed. See *Billy Baxter, Inc.* v. *Coca-Cola, Inc.*, 431 F.2d 183, 187 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971).

Plaintiff seeks reversal of this holding because of his newly-asserted claim (P. Br. 13), which has no support in the record, that any such application would have been denied. This *ipse dixit* provides no basis for reversal of the District Court's determination. In any event, a denial of any

application for membership would not give him standing to sue, under the doctrine of *Billy Baxter,* unless he could make some showing that the denial was directly and proximately attributable to the claimed arbitrary restriction on the number of members.

More importantly, the District Court did not rest its dismissal of this claim on plaintiff's lack of standing alone, but held that the Exchange Act, as interpreted by the Supreme Court in the *Silver* case, clearly contemplated that exchanges would have limited membership and, thus, that such a numerical limitation does not violate the antitrust laws. (App. 343)

Conclusion

For the reasons set forth above, the District Court's decision was in all respects correct and should be affirmed.

April 29, 1974

Respectfully submitted,

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A P P E N D I X

[COMMITTEE PRINT NO. 21

APRIL 17, 1973

93D CONGRESS
1ST SESSION

S.

IN THE SENATE OF THE UNITED STATES

APRIL , 1973

Mr. ---------- introduced the following bill; which was read twice and referred to the Committee on ----------

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A BILL

To amend the Securities Exchange Act of 1934 to prohibit the fixing of minimum rates of commission and to regulate the transactions of members of national securities exchanges, to amend the Investment Company Act of 1940 and the Investment Advisers Act of 1940 to define certain duties of persons subject to such Acts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. Section 6(e) of the Securities Exchange Act of 1934, as amended (15 U.S.C. 78f(e)), is amended to read as follows:

"(e) Nothing in this title shall be construed to prevent any exchange from adopting and enforcing any rule not inconsistent with this title and the rules and regulations there-

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under and the applicable laws of the State in which it is located, except that, after April 30, 1974, no exchange shall maintain or enforce any rule fixing minimum rates of commissions with respect to any transaction: *Provided, however,* That the Commission may, by rule, permit an exchange to fix reasonable minimum rates of commission until April 30, 1975, for transactions or portions of transactions which involve $100,000 or less if the Commission finds that the public interest requires the continuation, establishment, or reestablishment of reasonable fixed minimum rates for such transactions or portions of transactions."

SEC. 2. Section 11 (a) of the Securities Exchange Act of 1934 (15 U.S.C. 78k (a)) is amended to read as follows:

"(a) (1) The Commission shall prescribe such rules and regulations as it deems necessary or appropriate in the public interest or for the protection of investors, to regulate or prevent trading on national securities exchanges by members thereof from on or off the floor of the exchange, directly or indirectly for their own account or for the account of any affiliated person. Such rules shall, as a minimum, require that such trading contribute to the maintenance of a fair and orderly market.

"(2) It shall be unlawful for a member to effect any transaction in a security in contravention of rules and regulations under paragraph (1), but such rules and regulations

may contain such exemptions for arbitrage, block positioning, or market maker transactions, for transactions in exempted securities, for transactions by odd-lot dealers and specialists (within the limitations of subsection (b) of this section), and for such other transactions as the Commission may deem necessary or appropriate in the public interest or for the protection of investors."

SEC. 3. Section 11 of the Securities Exchange Act of 1934 (15 U.S.C. 78k) is amended by inserting after subsection (e) the following new subsection:

"(f) (1) It shall be unlawful for a member of a national securities exchange to effect, whether as broker or dealer, any transaction on such exchange with or for its own account, the account of any affiliated person of such member or any managed institutional account. As used herein the term 'managed institutional account' means an account of a bank, insurance company, trust company, investment company, separate account, pension-benefit or profit-sharing trust or plan, foundation or charitable endowment fund, or other similar type of institutional account for which such member or any affiliated person thereof (i) is empowered to determine what securities shall be purchased or sold, or (ii) makes day-to-day decisions as to the purchase or sale of securities even though some other person may have ultimate responsibility for the investment decisions for such account.

"(2) The provisions of paragraph (1) of this subsection shall not apply to—

"(A) any transaction by a registered specialist in a security in which he is so registered;

"(B) any transaction for the account of an odd-lot dealer in a security in which he is so registered;

"(C) any transaction by a block positioner or market maker acting as such, except where an affiliated person or managed institutional account is a party to the transaction;

"(D) any stabilizing transaction effected in compliance with rules under section 10(b) of this title to facilitate a distribution of a security in which the member effecting such transaction is participating;

"(E) any bona fide arbitrage transaction, including hedging between an equity security and a security entitling the holder to acquire such equity security, or any risk arbitrage transaction in connection with a merger, acquisition, tender offer, or similar transaction involving a recapitalization;

"(F) any transaction made with the prior approval of a floor official to permit the member effecting such transaction to contribute to the maintenance of a fair and orderly market, or any purchase or sale to reverse any such transaction;

"(G) any transaction to offset a transaction made in error; or

"(H) any transaction for a member's own account or the account of an affiliated person who is a natural person effected in compliance with rules promulgated by the Commission under section 11(a) of this title.

"(3) The provisions of paragraph (1) of this subsection shall not apply to transactions by (i) any person who was a member of any national securities exchange on January 16, 1973, or (ii) any person who became a member of a national securities exchange subsequent to January 16, 1973, pursuant to a court order or a court-approved settlement agreement in connection with litigation instituted prior to January 16, 1973, during the following periods:

"(A) prior to twelve months from the last date on which any national securities exchange maintains or enforces any rule fixing minimum commission rates;

"(B) for a period of twelve months following the date specified in subparagraph (A), if the total value of all such transactions effected by such person during such period (other than transactions described in subparagraphs (A) through (G) of paragraph (2)) does not exceed 20 per centum of the total value of all transactions effected by such person on all national securities exchanges during such period; and

"(C) for a period of twelve months following the period specified in subparagraph (B), if the total value of all such transactions effected by such person during such period (other than transactions described in subparagraphs (A) through (G) of paragraph (2)) does not exceed 10 per centum of the total value of all transactions effected by such person on all national securities exchanges during such period.

"(4) It shall be unlawful for a member of a national securities exchange to utilize any scheme, device, arrangement, agreement or understanding designed to circumvent or avoid, by reciprocal means or in any other manner, the policy and purposes of this subsection or any rule or regulation the Commission may prescribe as necessary or appropriate to effect such policy and purposes."

SEC. 4. Section 19(b)(9) of the Securities and Exchange Act of 1934 (15 U.S.C. 78s(b)(9)) is amended to read as follows: "(9) the fixing of reasonable rates of interest, listing and other charges;".

SEC. 5. Section 19(b) of the Securities and Exchange Act of 1934 (15 U.S.C. 78s) is amended by inserting after subsection (e) the following new subsection:

"(f) The Commission, having due regard for the public interest, the protection of investors, and the need to assure fair dealing in securities, and to preserve and foster competi-

tion among exchanges and between exchange markets and other markets in listed securities, shall on or before April 30, 1974, take such steps as are within its power to establish equal regulatory requirements in all such markets when such requirements are in the public interest. The Commission shall, on or before April 30, 1974, report to the Congress on the steps taken and make recommendations for legislative authority which it deems necessary to provide for such equal regulation in all markets, if the Commission determines that it lacks the necessary authority or is otherwise unable to do so."

SEC. 6. Section 36 of the Investment Company Act of 1940 (15 U.S.C. 80a-35) is amended by inserting after subsection (b) the following new subsection:

"(c) It shall not be deemed unlawful or a breach of fiduciary duty for an investment adviser or other person referred to in subsection (a) (1) of this section to cause or induce a registered investment company to pay a commission to a broker for effecting a transaction, which is in excess of commissions then being charged by other brokers for effecting similar transactions, if—

"(1) such investment adviser or other person determines in good faith that research services provided by such broker for the benefit of such investment company justify such payment;

"(2) such registered investment company makes

appropriate disclosures to its security holders, of its policies and practices in this regard, at such times and in such manner as the Commission shall prescribe by rules or regulations; and

"(3) such broker is not a person referred to in subsection (a) (1) or (a) (2) of this section or an affiliated person of any such person."

SEC. 7. Section 206 of the Investment Advisers Act of 1940 (15 U.S.C. 80b-6) is amended—

(1) by inserting the designation "(a)" immediately after "SEC. 206."; and

(2) by adding at the end thereof the following:

"(b) It shall not be deemed unlawful or a breach of fiduciary duty for an investment adviser to cause or induce a client to pay a commission to a broker for effecting a transaction, which is in excess of commissions then being charged by other brokers for effecting similar transactions, if—

"(1) such investment adviser determines in good faith that research services provided by such broker for the benefit of such client justify such payment;

"(2) such investment adviser makes appropriate disclosures to such client, of its policies and practices in this regard, at such times and in such manner as the

Commission shall prescribe by rules or regulations; and

"(3) such broker is not the investment adviser or an affiliated person of such investment adviser."

SEC. 8. Section 15 of the Investment Company Act of 1940 (15 U.S.C. 80a-15) is amended by adding at the end thereof a new subsection as follows:

"(f) (1) An investment adviser or a corporate trustee performing the functions of an investment adviser of a registered investment company, or an affiliated person of such investment adviser, may receive any amount of benefit in connection with a sale of securities of, or a sale of any other interest in, an investment adviser or a corporate trustee performing the functions of an investment adviser which results in an assignment of an investment advisory contract with such company or the change in control of or identity of a corporate trustee who performs the functions of an investment adviser, if—

"(A) for a period of three years after the time of such assignment, at least 75 per centum of the members of the board of directors of such registered company or such corporate trustee (or successor thereto, by reorganization or otherwise) are not (i) interested persons of the investment adviser of such company, or (ii) in-

terested persons of the predecessor investment adviser; and

"(B) there is not imposed an unfair burden on such company as a result of such transaction or any express or implied terms, conditions, or understandings applicable thereto.

For the purpose of subsection (f) (1) (B) an unfair burden on a registered investment company includes any arrangement, during the two-year period after the date on which any such transaction occurs, whereby the investment adviser or predecessor or successor investment adviser of such company or any interested person of any such adviser, receives or is entitled to receive any compensation directly or indirectly (i) from any person in connection with the purchase or sale of securities or other property to, from, or on behalf of such company, other than bona fide ordinary compensation as principal underwriter for such company, or (ii) from such company or its security holders for other than bona fide investment advisory or other services.

"(2) If (i) an assignment of an investment advisory contract with a registered investment company results in a successor investment adviser to such company and if such successor is then an investment adviser with respect to other assets substantially greater in amount than the amount of assets of such company, or (ii) as a result of a merger of,

or a sale of substantially all the assets by, a registered investment company with or to another registered investment company with assets substantially greater in amount a transaction occurs which would be subject to subsection (f) (1) (A), such discrepancy in size of assets shall be considered by the Commission in determining whether or to what extent an application under section 6 (c) for exemption from the provisions of subsection (f) (1) (A) should be granted.

"(3) Subsection (f) (1) (A) shall not apply to a transaction in which a controlling block of outstanding voting securities of an investment adviser to a registered investment company or of a corporate trustee performing the functions of an investment adviser to a registered investment company is—

"(A) distributed to the public and in which there is, in fact, no change in the identity of the persons who control such investment adviser,

"(B) transferred by the personal representatives of a deceased stockholder to the investment adviser or corporate trustee or to one or more of the persons who were stockholders of the investment adviser or corporate trustee at the time of the decedent's death: *Provided*, That (i) each transferee held at the time of such death at least 10 per centum of the outstanding voting securities

of such investment adviser and (ii) the transferees owned in the aggregate more than 25 per centum of such voting securities at the time of such death, or

"(C) transferred to the investment adviser or an affiliated person or persons of such investment adviser or is transferred from the investment adviser to an affiliated person or persons of the investment adviser: *Provided*, That the transferor or transferors receive an amount of benefit in connection with such transfer no greater than an amount equal to the fair net asset value of the securities transferred, excluding from such fair value any amount attributable to any investment advisory contract, past, existing, or prospective, which such adviser or any affiliated person thereof may have with any registered investment company."

SEC. 9. Section 15(c) of the Investment Company Act of 1940 (15 U.S.C. 80a-15(c)) is amended by adding at the end thereof a new sentence as follows: "It shall be unlawful for the directors of a registered investment company, in connection with their evaluation of the terms of any contract whereby a person undertakes regularly to serve or act as investment adviser of such company, to take into account the purchase price or other consideration any person may have paid in connection with a transaction of the type re-

ferred to in subsection (f) or specifically exempt therefrom by paragraph (2) or (3) of subsection (f)."

SEC. 10. Section 16 of the Investment Company Act of 1940 (15 U.S.C. 80a-16) is amended—

(1) by redesignating subsection (b) as subsection (c); and

(2) by adding after subsection (a) a new subsection as follows:

"(b) Any vacancy on the board of directors of a registered investment company which occurs in connection with compliance with section 15(f)(1)(A) and which must be filled by a person who is not an interested person of either party to a transaction subject to section 15(f)(1)(A) shall be filled only by a person (i) who has been selected and proposed for election by the directors of such company who are not such interested persons, and (ii) who has been elected by the holders of the outstanding voting securities of such company, except that in the case of the death, disqualification, or bona fide resignation of a director selected and elected pursuant to clauses (i) and (ii) of this subsection (b), the vacancy created thereby may be filled as provided in subsection (a)."

SEC. 11. Section 10(c) of the Investment Company

Act of 1940 (15 U.S.C. 80a-10(e)) is amended to read as follows:

"(e) If by reason of the death, disqualification, or bona fide resignation of any director or directors, the requirements of the foregoing provisions of this section or of section 15(f)(1) in respect of directors shall not be met by a registered investment company, the operation of such provisions shall be suspended as to such registered company—

"(1) for a period of thirty days if the vacancy or vacancies may be filled by action of the board of directors;

"(2) for a period of sixty days if a vote of stockholders is required to fill the vacancy or vacancies; or

"(3) for such longer period as the Commission may prescribe, by rules and regulations upon its own motion or by order upon application, as not inconsistent with the protection of investors."

SEC. 12. This Act shall become effective on the date of its enactment, except that section 4 of this Act, which amends section 19(b) of the Securities and Exchange Act of 1934, shall become effective on May 1, 1975.

[COMMITTEE PRINT NO. 2]

APRIL 17, 1973

93D CONGRESS
1ST SESSION

S.

A BILL

To amend the Securities Exchange Act of 1934 to prohibit the fixing of minimum rates of commission and to regulate the transactions of members of national securities exchanges, to amend the Investment Company Act of 1940 and the Investment Advisers Act of 1940 to define certain duties of persons subject to such Acts, and for other purposes.

By Mr. _____

APRIL , 1973

Read twice and referred to the Committee on _____

Calendar No. 177

93d CONGRESS
1st SESSION

S. 470

[Report No. 93-187]

IN THE SENATE OF THE UNITED STATES

JANUARY 18, 1973

Mr. WILLIAMS (for himself, Mr. BENNETT, and Mr. TOWER) introduced the following bill; which was read twice and referred to the Committee on Banking, Housing and Urban Affairs

MAY 31, 1973

Reported by Mr. WILLIAMS, with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

To amend the Securities Exchange Act of 1934 to regulate the transactions of members of national securities exchanges, to amend the Investment Company Act of 1940 and the Investment Advisers Act of 1940 to define certain duties of persons subject to such Acts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

~~SECTION 1. Section 11(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78k(a)) is amended to read as follows:~~

~~"(a) The Commission shall prescribe such rules and regulations as it deems necessary or appropriate in the public interest or for the protection of investors (1) to regulate or prevent floor trading by members of national securities ex-~~

changes, directly or indirectly for their own account or for discretionary accounts, and (2) to prevent trades on the exchange but off the floor by members, directly or indirectly for their own account, or for the account of any person controlling, controlled by, or under common control with any such member, which do not yield priority, parity, and precedence to public orders and which do not contribute to the maintenance of a fair and orderly market. It shall be unlawful for a member to effect any transaction in a security in contravention of such rules and regulations, but such rules and regulations may contain such exemptions for arbitrage, block positioning, or market maker transactions, for transactions in exempted securities, for transactions by odd-lot dealers and specialists (within the limitations of subsection (b) of this section), and for such other transactions as the Commission may deem necessary or appropriate in the public interest or for the protection of investors. For the purpose of this subsection, the Comission is authorized to define the terms used herein by rule, regulation, or order in the public interest or for the protection of investors."

SEC. 2. Section 11 of the Securities Exchange Act of 1934 (15 U.S.C. 78k) is amended by inserting after subsection (e) the following new subsection:

"(f) (1) It shall be unlawful for a member of a national securities exchange to effect, whether as broker or dealer, any

transaction on such exchange with or for its own account, the account of any affiliate of such member or any managed institutional account. As used herein—

"(A) the term 'affiliate' means a person who controls, is controlled by, or is under common control with such members; and

"(B) the term 'managed institutional account' means an account of a bank, insurance company, trust company, investment company, separate account, pension or profit-sharing trust or plan, foundation or charitable endowment fund for which such member or any affiliate thereof (i) has legal authority to select the securities bought or sold or (ii) makes day-to-day decisions on the purchase or sale of securities even though some other person may have ultimate responsibility for the investment decisions for such account.

"(2) The provisions of paragraph (1) of this subsection shall not apply to—

"(A) any transaction by a registered specialist in a security in which he is so registered;

"(B) any transaction for the account of an odd-lot dealer in a security in which he is so registered;

"(C) any transaction by a block positioner acting as such, except where an affiliated person is a party to the transaction;

"(D) any stabilizing transaction effected in compliance with rules under section 10(b) of this title to facilitate a distribution of a security in which the member organization effecting such transaction is participating;

"(E) any bona fide arbitrage transaction, including hedging between an equity security and a security entitling the holder to acquire such equity security, or any risk arbitrage transaction in connection with a merger, acquisition, tender, offer, or similar transaction involving a recapitalization; and

"(F) any transaction for a member's own account or the account of an affiliate who is an individual effected in compliance with rules promulgated by the Commission under section 11(a) of this title, and with such further rules as the Commission may promulgate limiting the aggregate amount of such transactions in relation to the total transactions effected by such member.

"(3) The provisions of paragraph (1) of this subsection shall not apply to transactions effected by (i) any person who was a member of a national securities exchange on October 9, 1972, with or for its own account or for the account of any person who was an affiliate or a managed institutional account of such person on October 9, 1972, or (ii) any person who became a member of a national securities exchange subsequent to October 9, 1972, pursuant to a court

order or a court approved settlement agreement, with or for its own account or for the account of any person who was an affiliate or a managed institutional account of such person on the date membership was acquired, during the following periods:

"(A) prior to the last date on which any national securities exchange maintains or enforces any rule fixing minimum commission rates with respect to any portion of a transaction in excess of $100,000;

"(B) for a period of twelve months following the date specified in subparagraph (A), if the total value of all such transactions effected by such person during such period (other than transactions described in subparagraphs (A) through (E) of paragraph (2)) does not exceed 20 per centum of the total value of all transactions effected by such person on all national securities exchanges during such period; and

"(C) for a period of twelve months following the period specified in subparagraph (B), if the total value of all such transactions effected by such person during such period (other than transactions described in subparagraphs (A) through (E) of paragraph (2)) does not exceed 10 per centum of the total value of all transactions effected by such person on all national securities exchanges during such period."

SEC. 3. Section 36 of the Investment Company Act of 1940 (15 U.S.C. 80a-35) is amended by inserting after subsection (b) the following new subsection:

"(c) It shall not be deemed unlawful or a breach of fiduciary duty for an investment adviser or other person referred to in subsection (a)(1) of this section to cause or induce a registered investment company to pay a commission to a broker for effecting a transaction, which is in excess of commissions then being charged by other brokers for effecting similar transactions, if—

"(1) such investment adviser or other person determines in good faith that research services provided by such broker for the benefit of such investment company justify such payment;

"(2) such registered investment company discloses to its security holders, at such times and in such manner as the Commission shall prescribe by rules or regulations, its policy with respect to such payments, the amount of such payments, the identity of the recipients, and the nature of the research services provided; and

"(3) such broker is not a person referred to in subsection (a)(1) or (a)(2) of this section or an affiliated person of any such person."

SEC. 4. Section 206 of the Investment Advisers Act of 1940 (15 U.S.C. 80b-6) is amended—

(1) by inserting the designation "(a)" immediately after "SEC. 206."; and

(2) by adding at the end thereof the following:

"(b) It shall not be deemed unlawful or a breach of fiduciary duty for an investment adviser to cause or induce a client to pay a commission to a broker for effecting a transaction, which is in excess of commissions then being charged by other brokers for effecting similar transactions, if—

"(1) such investment adviser determines in good faith that research services provided by such broker for the benefit of such client justify such payment;

"(2) such investment adviser discloses to such client, at such times and in such manner as the Commission shall prescribe by rules or regulations, its policy with respect to such payments, the amount of such payments, the identity of the recipients, and the nature of the research services provided; and

"(3) such broker is not an affiliated person of such investment adviser."

SEC. 5. Section 15 of the Investment Company Act of 1940 (15 U.S.C. 80a–15) is amended by adding at the end thereof a new subsection as follows:

"(f)(1) An investment adviser of a registered investment company, or an affiliated person of such investment adviser, may receive any amount or benefit in connection

with a sale of securities of, or a sale of any other interest in, an investment adviser which results in an assignment of an investment advisory contract with such company, if—

"(A) for a period of three years after the time of such assignment at least 75 per centum of the members of the board of directors of such registered company (or successor thereto, by reorganization or otherwise) are not (i) interested persons of the investment adviser of such company, or (ii) interested persons of the predecessor investment adviser; and

"(B) there is not imposed an unfair burden on such company as a result of such transaction or any express or implied terms, conditions, or understandings applicable thereto.

For the purpose of subsection (f)(1)(B) an unfair burden on a registered investment company includes any arrangement during the two-year period after the date on which any such transaction occurs whereby the investment adviser or predecessor or successor investment adviser of such company or any interested person of any such adviser, receives or is entitled to receive any compensation directly or indirectly (i) from any person in connection with the purchase or sale of securities or other property to, from, or on behalf of such company, other than bona fide ordinary compensation as principal underwriter for such company, or (ii) from

such company or its security holders for other than bona fide investment advisory or other services.

"(2) If (i) an assignment of an investment advisory contract with a registered investment company results in a successor investment adviser to such company and if such successor is then an investment adviser with respect to other assets substantially greater in amount than the amount of assets of such company, or (ii) as a result of a merger of, or a sale of substantially all the assets by a registered investment company with or to another registered investment company with assets substantially greater in amount a transaction occurs which would be subject to subsection (f)(1)(A), such discrepancy in size of assets shall be considered by the Commission in determining whether or to what extent an application under section 6(c) for exemption from the provisions of subsection (f)(1)(A) should be granted.

"(3) Subsection (f)(1) shall not apply to a transaction in which a controlling block of outstanding voting securities of an investment adviser to a registered investment company is distributed to the public and in which there is, in fact, no change in the identity of the persons who control such investment adviser."

SEC. 6. Section 15(c) of the Investment Company Act of 1940 (15 U.S.C. 80a–15(c)) is amended by adding at the end thereof a new sentence as follows: "It shall be un-

lawful for the directors of a registered investment company in connection with their evaluation of the terms of any contract whereby a person undertakes regularly to serve or act as investment adviser of such company, to take into account the purchase price or other consideration any person may have paid in connection with a transaction of the type referred to in subsection (f) or specifically exempt therefrom by paragraph (2) or (3) of subsection (f).".

SEC. 7. Section 16 of the Investment Company Act of 1940 (15 U.S.C. 80a-16) is amended—

(1) by redesignating subsection (b) as subsection (c); and

(2) by adding after subsection (a) a new subsection as follows:

"(b) Any vacancy on the board of directors of a registered investment company which occurs in connection with compliance with section 15(f)(1)(A) and which must be filled by a person who is not an interested person of either party to a transaction subject to section 15(f)(1)(A) shall be filled only by a person (i) who has been selected and proposed for election by the directors of such company who are not such interested persons and (ii) who has been elected by the holders of the outstanding voting securities of such company, except that in the case of the death, disqualification or bona fide resignation of a director selected

and elected pursuant to clauses (i) and (ii) of this subsection (b), the vacancy created thereby may be filled as provided in subsection (a).".

SEC. 8. Section 10(e) of the Investment Company Act of 1940 (15 U.S.C. 80a-10(e)) is amended to read as follows:

"(e) If by reason of the death, disqualification, or bona fide resignation of any director or directors, the requirements of the foregoing provisions of this section or of section 15(f)(1) in respect of directors shall not be met by a registered investment company, the operation of such provisions shall be suspended as to such registered company—

"(1) for a period of thirty days if the vacancy or vacancies may be filled by action of the board of directors;

"(2) for a period of sixty days if a vote of stockholders is required to fill the vacancy or vacancies; or

"(3) for such longer period as the Commission may prescribe by rules and regulations upon its own motion or by order upon application as not inconsistent with the protection of investors."

SECTION 1. Section 11(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78k(a)) is amended to read as follows:

"(a)(1) The Commission shall prescribe such rules and

regulations as it deems necessary or appropriate in the public interest or for the protection of investors, to regulate or prevent trading on national securities exchanges by members thereof from on or off the floor of the exchange, directly or indirectly for their own account or for the account of any affiliated person or, in the case of floor trading, for any discretionary account. Such rules shall, as a minimum, require that such trading contribute to the maintenance of a fair and orderly market.

"(2) It shall be unlawful for a member to effect any transaction in a security in contravention of rules and regulations under paragraph (1), but such rules and regulations may contain such exemptions for arbitrage, block positioning, or market maker transactions, for transactions in exempted securities, for transactions by odd-lot dealers and specialists (within the limitations of subsection (b) of this section), for transactions by affiliated persons who are natural persons, and for such other transactions as the Commission may deem necessary or appropriate in the public interest or for the protection of investors."

SEC. 2. Section 11 of the Securities Exchange Act of 1934 (15 U.S.C. 78k) is amended by inserting after subsection (e) the following new subsection:

"(f)(1) It shall be unlawful for a member of a national securities exchange to effect, whether as broker or

dealer, any transaction on such exchange with or for its own account, the account of any affiliated person of such member, or any managed institutional account. As used herein the term 'managed institutional account' means an account of a bank, insurance company, trust company, investment company, separate account, pension-benefit or profit-sharing trust or plan, foundation or charitable endowment fund, or other similar type of institutional account for which such member of any affiliated person thereof (A) is empowered to determine what securities shall be purchased or sold, or (B) makes day-to-day decisions as to the purchase or sale of securities even though some other person may have ultimate responsibility for the investment decisions for such account.

"(2) The provisions of paragraph (1) of this subsection shall not apply to—

"(A) any transaction by a registered specialist acting as such in a security in which he is so registered;

"(B) any transaction for the account of an odd-lot dealer in a security in which he is so registered;

"(C) any transaction by a block positioner or market maker acting as such, except where an affiliated person or managed institutional account is a party to the transaction;

"(D) any stabilizing transaction effected in compliance with rules under section 10(b) of this title to facilitate a distribution of a security in which the member effecting such transaction is participating;

"(E) any bona fide arbitrage transaction, including hedging between an equity security and a security entitling the holder to acquire such equity security, or any risk arbitrage transaction in connection with a merger, acquisition, tender offer, or similar transaction involving a recapitalization;

"(F) any transaction made with the prior approval of a floor offical to permit the member effecting such transaction to contribute to the maintenance of a fair and orderly market, or any purchase or sale to reverse any such transaction;

"(G) any transaction to offset a transaction made in error; or

"(H) any transaction for a member's own account or the account of an affiliated person who is a natural person effected in compliance with rules and regulations prescribed by the Commission under section 11(a) of this title.

"(3) The provisions of paragraph (1) of this subsection shall not apply to transactions by any member of any national securities exchange with or for its own account or

for the account of any person who is an affiliated person or a managed institutional account of such member, during the following periods:

"(A) prior to the last date on which any national securities exchange maintains or enforces any rule fixing rates of commission, or prior to April 30, 1976, whichever is later;

"(B) for a period of twelve months following the date specified in subparagraph (A), if the total value of all such transactions effected by such member during such period on all national securities exchanges of which it is a member (other than transactions described in subparagraphs (A) through (C) of paragraph (2)) does not exceed 20 per centum of the total value of all transactions effected by such member during such period on all such exchanges; and

"(C) for a period of twelve months following the period specified in subparagraph (B), if the total value of all such transactions effected by such member during such period on all national securities exchanges of which it is a member (other than transactions described in subparagraphs (A) through (C) of paragraph (2)) does not exceed 10 per centum of the total value of all transactions effected by such member during such period on all such exchanges.

"(4) It shall be unlawful for a member of a national securities exchange to utilize any scheme, device, arrangement, agreement, or understanding designed to circumvent or avoid, by reciprocal means or in any other manner, the policy and purposes of this subsection or any rule or regulation the Commission may prescribe as necessary or appropriate to effect such policy and purposes."

SEC. 3. Section 36 of the Investment Company Act of 1940 (15 U.S.C. 80a-35) is amended by inserting after subsection (b) the following new subsection:

"(c) It shall not be deemed unlawful or a breach of fiduciary duty for an investment adviser or other person referred to in subsection (a)(1) of this section to cause or induce a registered investment company to pay a commission to a broker for effecting a transaction, which is in excess of commissions then being charged by other brokers for effecting similar transactions, if—

"(1) such investment adviser or other person determines in good faith that research services provided by such broker for the benefit of such investment company justify such payment;

"(2) such registered investment company makes appropriate disclosures to its security holders of its policies and practices in this regard, at such times and in

such manner as the Commission shall prescribe by rules or regulations: and

"(3) such broker is not a person referred to in subsection (a)(1) or (a)(2) of this section or an affiliated person of any such person."

SEC. 4. Section 206 of the Investment Advisers Act of 1940 (15 U.S.C. 80b-6) is amended—

(1) by inserting the designation "(a)" immediately after "SEC. 206."; and

(2) by adding at the end thereof the following:

"(b) It shall not be deemed unlawful or a breach of fiduciary duty for an investment adviser to cause or induce a client to pay a commission to a broker for effecting a transaction, which is in excess of commissions then being charged by other brokers for effecting similar transactions, if—

"(1) such investment adviser determines in good faith that research services provided by such broker for the benefit of such client justify such payment;

"(2) such investment adviser makes appropriate disclosures to such client of its policies and practices in this regard, at such times and in such manner as the Commission shall prescribe by rules or regulations; and

"(3) such broker is not the investment adviser or an affiliated person of such investment adviser."

SEC. 5. Section 15 of the Investment Company Act of 1940 (15 U.S.C. 80a–15) is amended by adding at the end thereof a new subsection as follows:

"(f)(1) An investment adviser or a corporate trustee performing the functions of an investment adviser of a registered investment company, or an affiliated person of such investment adviser or corporate trustee may receive any amount of benefit in connection with a sale of securities of, or a sale of any other interest in, an investment adviser or a corporate trustee performing the functions of an investment adviser which results in an assignment of an investment advisory contract with such company or the change in control of or identity of a corporate trustee who performs the functions of an investment adviser, if—

"(A) for a period of three years after the time of such assignment, at least 75 per centum of the members of the board of directors of such registered company or such corporate trustee (or successor thereto, by reorganization or otherwise) are not (i) interested persons of the investment adviser of such company, or (ii) interested persons of the predecessor investment adviser; and

"(B) there is not imposed an unfair burden on such company as a result of such transaction or any express or implied terms, conditions, or understandings applicable thereto.

For the purpose of subsection (f)(1)(B), an unfair burden on a registered investment company includes any arrangement, during the two-year period after the date on which any such transaction occurs, whereby the investment adviser or corporate trustee or predecessor or successor investment adviser or corporate trustee or any interested person of any such adviser or any such corporate trustee receives or is entitled to receive any compensation directly or indirectly (i) from any person in connection with the purchase or sale of securities or other property to, from, or on behalf of such company, other than bona fide ordinary compensation as principal underwriter for such company, or (ii) from such company or its security holders for other than bona fide investment advisory or other services.

"(2) If (i) an assignment of an investment advisory contract with a registered investment company results in a successor investment adviser or a corporate trustee performing the functions of an investment adviser to such company and if such successor is then an investment adviser or performs such functions with respect to other assets substantially greater in amount than the amount of assets of such company, or

"(ii) as a result of a merger of, or a sale of substantially all the assets by, a registered investment company with or to another registered investment company with assets sub-

stantially greater in amount a transaction occurs which would be subject to subsection (f)(1)(A), such discrepancy in size of assets shall be considered by the Commission in determining whether or to what extent an application under section 6(c) for exemption from the provisions of subsection (f)(1)(A) should be granted.

"(3) Subsection (f)(1)(A) shall not apply to a transaction in which a controlling block of outstanding voting securities of an investment adviser to a registered investment company or of a corporate trustee performing the functions of an investment adviser to a registered investment company is—

"(A) distributed to the public and in which there is, in fact, no change in the identity of the persons who control such investment adviser or corporate trustee, or

"(B) transferred to the investment adviser or the corporate trustee, or an affiliated person or persons of such investment adviser or corporate trustee, or is transferred from the investment adviser or corporate trustee to an affiliated person or persons of the investment adviser: Provided, that (i) each transferee (other than such adviser or trustee) is a natural person and (ii) the transferees (other than such adviser or trustee) owned in the aggregate more than 25 per centum of such voting

securities for a period of at least six months prior to such transfer."

SEC. 6. Section 15(c) of the Investment Company Act of 1940 (15 U.S.C. 80a-15(c)) is amended by adding at the end thereof a new sentence as follows: "It shall be unlawful for the directors of a registered investment company, in connection with their evaluation of the terms of any contract whereby a person undertakes regularly to serve or act as investment adviser of such company, to take into account the purchase price or other consideration any person may have paid in connection with a transaction of the type referred to in subsection (f) or specifically exempt therefrom by paragraph (2) or (3) of subsection (f)."

SEC. 7. Section 16 of the Investment Company Act of 1940 (15 U.S.C. 80a-16) is amended—

(1) by redesignating subsection (b) as subsection (c); and

(2) by adding after subsection (a) a new subsection as follows:

"(b) Any vacancy on the board of directors of a registered investment company which occurs in connection with compliance with section 15(f)(1)(A) and which must be filled by a person who is not an interested person of either party to a transaction subject to section 15(f)(1)(A) shall

be filled only by a person (i) who has been selected and proposed for election by the directors of such company who are not such interested persons, and (ii) who has been elected by the holders of the outstanding voting securities of such company, except that in the case of the death, disqualification, or bona fide resignation of a director selected and elected pursuant to clauses (i) and (ii) of this subsection (b), the vacancy created thereby may be filled as provided in subsection (a)."

SEC. 8. Section 10(e) of the Investment Company Act of 1940 (15 U.S.C. 80a-10(e)) is amended to read as follows:

"*(e) If by reason of the death, disqualification, or bona fide resignation of any director or directors, the requirements of the foregoing provisions of this section or of section 15(f)(1) in respect of directors shall not be met by a registered investment company, the operation of such provisions shall be suspended as to such registered company—*

"*(1) for a period of thirty days if the vacancy or vacancies may be filled by action of the board of directors;*

"*(2) for a period of sixty days if a vote of stockholders is required to fill the vacancy or vacancies; or*

"*(3) for such longer period as the Commission may prescribe, by rules and regulations upon its own motion*

or by order upon application, as not inconsistent with the protection of investors."

SEC. 9. Section 9 of the Investment Company Act of 1940 (15 U.S.C. 80a–9) is amended by adding at the end thereof a new subsection as follows:

"(d) For the purposes of subsections (a) through (c) of this section, the term 'investment adviser' includes a corporate or other trustee performing the functions of an investment adviser."

SEC. 10. Section 36 of the Investment Company Act of 1940 (15 U.S.C. 80a–35) is amended by adding at the end thereof a new subsection as follows:

"(d) For the purposes of subsections (a) through (c) of this section, the term 'investment adviser' includes a corporate or other trustee performing the functions of an investment adviser."

93D CONGRESS
1ST SESSION

H. R. 5050

IN THE HOUSE OF REPRESENTATIVES

MARCH 1, 1973

Mr. Moss (for himself, Mr. BROYHILL of North Carolina, Mr. STUCKEY, Mr. WARE, Mr. ECKHARDT, Mr. MCCOLLISTER, Mr. HELSTOSKI, Mr. YOUNG of Illinois, and Mr. BRECKINRIDGE) introduced the following bill; which was referred to the Committee on Interstate and Foreign Commerce

A BILL

To amend the Securities Exchange Act of 1934, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Securities Exchange Act Amendments of 1973".

TITLE I—SELECTION AND ADMINISTRATION OF THE COMMISSION

SEC. 101. (a) Section 4 of the Securities Exchange Act of 1934 (15 U.S.C. 78d) is amended to read as follows:

shall not require the reappointment or affect the terms of members of the Commission (including the Chairman of the Commission) holding office on the effective date of the Securities Exchange Act Amendments of 1973.

TITLE II—REGULATION OF EXCHANGES AND ASSOCIATIONS

SEC. 201. (a) Section 3(a)(3) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(3)) is amended to read as follows:

"(3) The term 'member' when used with respect to an exchange means (A) any person who is permitted to effect transactions on the exchange without the services of another person acting as broker, or (B) any person who transacts business as a broker or a dealer who agrees to be regulated by an exchange and with respect to whom the exchange undertakes to enforce compliance with its rules and with the provisions of this title, and any amendment thereto and any rule or regulation made or to be made thereunder, and includes any broker or dealer with which a member is an associated person."

(b) The amendment made by subsection (a) of this section shall take effect February 1, 1975.

SEC. 202. Section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f) is amended to read as follows:

"(E) the exchange appropriate for the use of the public representatives such sums as are necessary to permit the public representatives to employ such staff or retain such attorneys, consultants, or other experts as they may reasonably require, independent of the exchange staff;

"(F) the voting power of members of the exchange is distributed on a fair and equitable basis; and

"(G) there are reasonable limits on the length of time and the number of terms members of the governing body may serve;

"(4) the rules of the exchange provide for the equitable allocation of dues, fees, and other charges among its members;

"(5) the rules of the exchange are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to provide safeguards against unreasonable profits or unreasonable rates of commissions or other charges, and, in general, to protect investors and the public interest, and to remove impediments to and perfect the mechanism of a free and open market; and are not designed to permit unfair discrimination between or among customers, issuers, or brokers or dealers, to fix minimum profits, to impose any

schedule of prices, or to impose any schedule or fix rates of commissions, allowances, discounts, or other charges, except that (A) until February 1, 1974, such rules may fix reasonable minimum rates of commission for transactions or portions of transactions which involve $200,000 or less; and (B) until February 1, 1975, such rules may fix reasonable minimum rates of commissions for transactions or portions of transactions which involve $100,000 or less: *Provided, however,* That the Commission may, by rule, permit an exchange to fix reasonable minimum rates of commission until February 1, 1976, for transactions or portions of transactions which involve $100,000 or less if the Commission finds that the public interest requires the continuation, establishment, or reestablishment of reasonable fixed minimum rates for such transactions or portions of transactions.

"(6) the rules of the exchange provide that its members and persons associated with its members shall be appropriately disciplined for any violation of its rules by expulsion, suspension, fine, or censure, and in the case of a person associated with a member, by being suspended or barred from being associated with a member;

"(7) the rules of the exchange provide a fair and orderly procedure with respect to the disciplining of members and person associated with members and the

"(4) After appropriate notice and opportunity for hearing, by order to remove from office any officer, director, or employee of a registered national securities exchange who, the Commission finds, has willfully failed to enforce the rules of the exchange, or has willfully abused his authority.

"(5) And if in its opinion the public interest so requires, summarily to suspend trading in any registered security on any national securities exchange for a period not exceeding ten days, or, with the approval of the President, summarily to suspend all trading on any national securities exchange for a period not exceeding ninety days.

"(b) The Commission, having due regard for the public interest, the protection of investors and the need to assure fair dealing in securities, and to preserve and foster competition among exchanges and between exchange markets and markets occurring otherwise than on an exchange, shall, on or before February 1, 1975, take such steps as are within its power to establish a national market system for transactions in securities. The Commission shall, commencing in 1973 and ending in 1975, report annually to the Congress (1) the steps it has taken and its evaluation of the progress made toward the creation of a national market system, and (2) its

recommendations, if any, for further legislative authority to create such a system."

SEC. 209. The Securities Exchange Act of 1934 is amended by adding after section 20 (15 U.S.C. 78t) the following new section:

"SEC. 20A. (a) No national securities exchange registered under section 6 shall by rule or otherwise prohibit any of its members, when acting on behalf of a customer, from transacting business on any other exchange, or otherwise than on an exchange, and no national securities association registered under section 15A shall by rule or otherwise prohibit any of its members, when acting on behalf of a customer, from transacting business on a national securities exchange.

"(b) The Commission shall adopt rules which assure that any transaction by any registered broker or dealer or member of an exchange is executed at a net price to such member's customer which is better than or equivalent to the net price which would have been obtainable if such transaction were to have been executed (in any unit of trading) on any other exchange or otherwise than on an exchange.

"(c) No national securities exchange registered under section 6 and no national securities association registered under section 15A shall by rule or otherwise prohibit any of its members from participating in any clearing agency or

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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RICHARD A. GORDON, etc., :

Plaintiff-Appellant, : Dkt. No. 74-1043

-against- : CERTIFICATE OF SERVICE

NEW YORK STOCK EXCHANGE, INC., et al., :

Defendants-Appellees :

- x

I, MARK L. DAVIDSON, a member of the Bar of this Court, hereby certify that this 29th day of April, 1974, I caused to be served, by United States Mail, first class postage prepaid, two (2) copies of the "Brief for Defendants-Appellees", twenty-five (25) copies of which are submitted herewith, upon each of the following:

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Dated: New York, New York
April 29, 1974

Mark L. Davidson
Mark L. Davidson

Dkt. No. 74-1043

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

RICHARD A. GORDON, etc.,

Plaintiff-Appellant,

-against-

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Defendants-Appellees.

CERTIFICATE OF SERVICE

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